

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

VICTOR JAMES KAECH,

Plaintiff,

v.

OCWEN LOAN SERVICING, LLC;  
MORTGAGE ELECTRONIC  
REGISTRATION SYSTEMS, INC; U.S.  
BANK NATIONAL ASSOCIATION, AS  
TRUSTEE UNDER MORTGAGE  
POOLING AND SERVICING  
AGREEMENT DATED AS OF AUGUST  
1, 2007 MASTR ASSET-BACKED  
SECURITIES TRUST 2007 HE-2  
MORTGAGE PASS-THROUGH  
CERTIFICATES, SERIES 2007-HE2;  
FIDELITY NATIONAL TITLE  
INSURANCE COMPANY and DOE  
DEFENDANTS 1 through 20,

Defendants.

NO. 2:14-cv-00330-SAB

**ORDER GRANTING  
PLAINTIFF'S MOTION FOR  
PRELIMINARY INJUNCTION**

Before the Court is Plaintiff's Motion for Preliminary Injunction to Enjoin the Nonjudicial Foreclosure Sale. ECF No. 14. This Court issued a temporary restraining order ("TRO") on October 9, 2014 that remains in effect until October

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1 23, 2014. ECF No. 4. The TRO enjoined any of the defendants or their  
2 representatives from foreclosing on Plaintiff's property until a hearing for  
3 preliminary injunction could be held. A telephonic hearing was held on October  
4 22, 2014 at 11:30 a.m.

### 5 **BACKGROUND**

6 Plaintiff built his home at 1921 Dorner Place in Wenatchee, Washington  
7 98801-7351. Plaintiff obtained a mortgage from Decision One in May 2007. By  
8 the end of 2008, Plaintiff fell behind on payments to his mortgage servicer, Ocwen  
9 Loan Servicing, LLC, ("Ocwen") and was facing nonjudicial foreclosure. Plaintiff  
10 attempted but was unable to obtain a loan modification. After borrowing money  
11 from family and friends, Plaintiff was able to pay the arrears and prevent a  
12 foreclosure in 2008.

13 In 2009, Plaintiff again fell behind on his payments and received a default  
14 notice in October, setting March 2010 for a foreclosure sale. Plaintiff applied for a  
15 loan modification and was again denied, however, his application resulted in the  
16 2010 foreclosure sale being discontinued.

17 In April 2012, Plaintiff hired lawyers to assist him in obtaining a loan  
18 modification. Ocwen advised Plaintiff that he did not qualify for the federal  
19 government's Home Affordable Modification Program ("HAMP") but was being  
20 reviewed for an "in-house" modification. While the loan modification was  
21 pending, a new nonjudicial foreclosure sale was set for September 21, 2012—this  
22 foreclosure was also discontinued. Plaintiff claims he was sent a loan modification  
23 agreement in late October 2012, indicating that his new total monthly payment  
24 would be \$1,729.58. Plaintiff indicates he returned the signed agreement, along  
25 with the required payment by the stated November 1 due date. A few weeks later,  
26 Plaintiff allegedly received a notice that he was delinquent on payments and that  
27 his monthly payment was increasing to \$2,119.77. Plaintiff claims that he tried to  
28 make regular payments under the terms of the loan modification agreement but

1 was not allowed to do so via Ocwen's online payment system. In July 2013,  
2 Ocwen, on behalf of U.S. Bank, signed an Appointment of Successor Trustee  
3 document appointing Fidelity as the foreclosing trustee. Plaintiff disputes the  
4 validity of the document. Plaintiff was sent a Notice of Default on October 18,  
5 2013 which demanded various fees and expenses be paid in order to prevent  
6 foreclosure. Fidelity set the date of October 10, 2014 for the trustee sale. Plaintiff  
7 filed his Complaint and Motion for Temporary Restraining Order and/or  
8 Preliminary Injunction in Chelan County Superior Court on October 3, 2014.  
9 Fidelity removed the case to this Court on October 7, 2014.

#### 10 STANDARD

11 A party seeking a preliminary injunction must show (1) a likeliness to  
12 succeed on the merits, (2) a likeliness of irreparable harm absent an injunction, (3)  
13 the balance of equities is in its favor, and (4) an injunction is in the public interest.  
14 *Earth Island Institute v. Carlton*, 626 F.3d 462, 469 (9th Cir. 2010) (citing *Winter*  
15 *v. Natural Res. Def. Council*, 555 U.S. 7 (2008)). Alternatively, a preliminary  
16 injunction may be granted with a showing of (1) a likeliness of irreparable harm  
17 absent an injunction, (2) the existence of serious questions going to the merits of  
18 the case, (3) the balance of hardship tilts sharply toward the plaintiff, and (4) an  
19 injunction is in the public interest. *Alliance for the Wild Rockies v. Cottrell*,  
20 632 F.3d 1127, 1131-32 (9th Cir. 2011).

#### 21 ANALYSIS

22 Pursuant to Fed. R. Civ. P. 56(a), the Court has authority to issue a  
23 preliminary injunction to remain in effect until the resolution of Plaintiff's pending  
24 claims if the four elements from the *Winter* or *Cottrell* test are met. Specifically,  
25 Plaintiff seeks a prohibitory injunction which "prohibits a party from taking action  
26 and preserves the status quo pending a determination of the action on the merits."  
27 *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 878  
28 (9th Cir. 2009) (internal citation omitted). While a prohibitory injunction is still an

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1 “extraordinary remedy that may only be awarded upon a clear showing that the  
2 plaintiff is entitled to such relief” it is not as stringent a standard as for a  
3 mandatory injunction. *Winter*, 555 U.S. at 22; *Marlyn Nutraceuticals*, 571 F.3d at  
4 878. Here, Plaintiff satisfies the requirements for a prohibitory preliminary  
5 injunction.

6 First, Plaintiff has shown a likeliness of irreparable harm. Although Plaintiff  
7 would retain some remedies at law if his home is subject to a nonjudicial  
8 foreclosure sale, these remedies would be inadequate in this case. Real property—  
9 particularly one’s home—is unique, and monetary damages alone cannot suffice to  
10 make the plaintiff whole if he succeeds on the merits of his case. The likeliness of  
11 irreparable harm absent a preliminary injunction is exacerbated where, as here, the  
12 homeowner built his own home and has lived in it for thirteen years.

13 Second, Plaintiff has shown—at the very least—that serious questions going  
14 to the merits of the case exist. The Court does not purport to forecast the outcome  
15 of this case on the merits, however, sufficient questions exist as to the merits to  
16 justify a preliminary injunction. Plaintiff alleges that Fidelity lacks standing to  
17 foreclose on his home due to defects in assignment and questions regarding who  
18 holds the note. Plaintiff also alleges various violations of the Deeds of Trust Act  
19 and Consumer Protection Act, particularly regarding various expenses and fees he  
20 was charged.

21 There are also questions of whether Ocwen breached its duty of good faith  
22 and if it breached the loan modification agreement from October 2012. The loan  
23 modification agreement provided for monthly payments of \$1,729.58 that “may  
24 adjust periodically.” Plaintiff’s next billing statement jumped to \$2,119.77 due.  
25 Defendants suggest the increase in the payment was because of a \$214.64 lien by  
26 the City of Wenatchee for garbage and sewer services. This, however, does not  
27 come close to accounting for the increase in escrow payments, let alone the  
28 various fees and surcharges added to Plaintiff’s second statement. Neither party

1 has fully established its case, nor were they expected to at this stage of the  
2 proceedings, but Plaintiff has raised a sufficient likelihood of success on the merits,  
3 or at least the existence of serious questions going to the merits, to warrant  
4 issuance of a preliminary injunction to preclude a foreclosure sale of his home.

5 Third, the equities tip sharply in Plaintiff's favor. At stake is the house in  
6 which Plaintiff built himself and has lived in for thirteen years. On the other hand,  
7 Defendants' interests are solely monetary in nature. Although there is nothing  
8 wrong with the defendants acting to maximize profits, the equities tip sharply in  
9 the Plaintiff's favor in this case.

10 Fourth, the issuance of a preliminary injunction is in the public interest. The  
11 Deeds of Trust Act, RCW 61.24 *et seq.*, "furtheres three goals: (1) that the  
12 nonjudicial foreclosure process should be efficient and inexpensive, (2) that the  
13 process should result in interested parties having an adequate opportunity to  
14 prevent wrongful foreclosure, and (3) that the process should promote stability of  
15 land titles." *Albice v. Premier Mortg. Services of Washington, Inc.*, 174 Wn.2d  
16 560, 567 (2012). In this case, the first two of the legislature's stated policies  
17 conflict. Allowing the foreclosure sale prior to Plaintiff having his day in court  
18 would undoubtedly make the foreclosure process more efficient and inexpensive  
19 but would do so at great expense to the homeowner's rights. Additionally, public  
20 interest demands this Court reads the Consumer Protection Act as having the  
21 purpose of protecting consumers from potentially illegal practices by lenders.  
22 Therefore, this Court finds it is in the public interest to prevent the foreclosure  
23 process until Plaintiff has an adequate opportunity to present his case.

24 Accordingly, **IT IS HEREBY ORDERED:**

25 1. Plaintiff's Motion for Preliminary Injunction to Enjoin the  
26 Nonjudicial Foreclosure sale, ECF No. 14, is **GRANTED**.

27 2. The Court enjoins any attempt to foreclose on any real property of the  
28 plaintiff, Victor James Kaech, by any of the defendants or their agents, or any

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1 other person having notice of this Order. Specifically, the Court enjoins the sale of  
2 the real property located at 1921 Dorner Place, Wenatchee, WA 98801-7351.

3 3. This Order will be amended after counsel for Plaintiff and Defendant  
4 confer and recommend to the Court the amount of a monthly payment due to this  
5 Court from the Plaintiff as security, under Federal Rule of Civil Procedure 65(c).  
6 Counsel for Defendant Fidelity need not participate in these discussions. Counsel  
7 shall alert the Court as to the result of their discussions no later than October 28,  
8 2014.

9 4. This preliminary injunction will remain in effect until further Order of  
10 this Court.

11 **IT IS SO ORDERED.** The District Court Executive is hereby directed to  
12 file this Order and provide copies to counsel.

13 **DATED** this 22nd day of October, 2014.



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A handwritten signature in blue ink that reads "Stanley A. Bastian". The signature is written in a cursive, flowing style.

19 Stanley A. Bastian  
20 United States District Judge  
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